THE HON'BLE SRI JUSTICE K.C.BHANU

WRIT PETITION No. 1797 of 2003

Date: .09.2005

Between:

Col. Surinder Mohan, s/o. late Brig. Mohan,

Army Medical Officer (Senior Registrar and OC TPS area),

Military Hospital, Secunderabad

…Petitioner

and

1) Government of India, rep. by Under Secretary,

Ministry of Defence, New Delhi, & 2 others

… Respondents

ORDER:

Challenging the action of the respondents in not giving effect to the orders of respondents 1 and 2 dated 31.08.1998 in not promoting the petitioner to the rank of Colonel in the year 1996 and to the category of Brigadier along with his juniors in the month of December, 2001, and consequently direct the respondents to effectuate the promotions of the petitioner to the rank of Colonel and Brigadier with that of his

juniors from the years 1996 and December, 2001 respectively, the present Writ Petition is filed.

The brief facts which are necessary for disposal of this Writ Petitioner are as follows:

The petitioner joined in Indian Army as Commissioned Army Medical Corps Officer in Lieutenant rank in the year 1970 and subsequently got promoted as Captain, Major and Colonel; he became eligible for promotion as Colonel in the year 1995, but the Medical Board Selection gave 'D' grade (unfit for promotion) to him; on his appeal to the second respondent against the grading, he was promoted as Colonel from 25.05.1999; the Medical Board again graded him 'D' for promotion to the rank of Brigadier, by which the promotion was deferred; that he submitted a representation on 06.03.2002 to the respondents to furnish the reasons for deferring his promotion, but no reasons are furnished by the respondents; he is fully eligible and fit for promotion to the rank of Brigadier; the action of the respondents is without any justification, arbitrary, illegal and discriminatory. It is further stated that the order of the second respondent dated 31.08.1998 should apply to his promotion to the rank of Brigadier also; hence, the Writ petition.

The respondents filed counter affidavit denying the averments in the petitioner's affidavit and contending that duly constituted Selection Medical Board graded the petitioner 'D' (deferred) on 14.12.2001, which was communicated to the petitioner; that as per the circular dated 26.02.1996 of the Government of India, for promotion to the rank of Brigadier, a minimum of three Annual Confidential Reports (A.C.Rs.) in the present rank within the cut off date fixed should be available; grading 'D' was given due to some administrative or technical reasons like non-availability of A.C.Rs. etc.; the petitioner was not eligible for promotion in 1995 itself; that in obedience of the order of the second respondent dated 31.08.1998,

the petitioner was promoted to Colonel rank vide order dated 23.10.1998, but he assumed the charge on 21.05.1999 due to some administrative reasons; since the petitioner could not earn requisite number of A.C.Rs. in the rank of Colonel as per clause 8 of the promotion policy letter, the Selection Board graded him 'D'(defer consideration of the case till the next assessment by the selection board), which was communicated to the petitioner vide letter dated 08.02.2002; the petitioner's representation dated 06.03.2002 is a query with a request to intimate the reasons for deferring his case for promotion to the rank of Brigadier, to which the respondents are not bound to reply as per the established procedure and guidelines; the Writ Petition is filed without exhausting the remedy of complaining to the Central Government as per Section 27 of the Army Act; there is no infringement of right of the petitioner; hence, they prayed to dismiss the Writ Petition.

The learned counsel for the petitioner contended that the petitioner became eligible for promotion to the rank of Brigadier in the year 1995 itself and on his representation, the Central Government directed the respondents to give promotion without effect on pay and allowances; pursuant to the orders of the second respondent, the petitioner was promoted as Colonel with effect from 25.05.1999, whereas his eligibility for promotion to the said rank had arisen in the year 1995 itself; even in the selection for promotion to the rank of Brigadier, he was given 'D' grade for which there is no justification; therefore, the action of the respondents is clearly arbitrary and illegal; awarding of 'D' grade is not in accordance with the Rules. He further contended that all the A.C.Rs were available with the selection committee and that no disciplinary case is pending against him as on the date of his selection; that the promotion to the rank of Colonel was delayed without any reason; hence, he prays to allow the Writ Petition.

On the other hand, the learned Assistant Solicitor General appearing for the respondents contended that the selection process in the year 1996 relates to the rank of Colonel; and in the selections that took place in the year 2000-2001 for promotion to the rank of Brigadier, the petitioner was not selected; admittedly, promotion to the rank of Brigadier from Colonel is based upon merit; the selection process has not been challenged and hence, there are no grounds to interfere with the impugned proceedings.

Although an employee has no right to be promoted, he has a right to be considered for promotion. This right to be considered for promotion is one of the matters relating to employment or appointment. The Fundamental Right to equality under Articles 14 and 16 of the Constitution, therefore, prohibits application of unreasonable or unfair standards in the matter of considering an employee for promotion. Discrimination or unfairness or unreasonableness in the Rules or norms or the policies relating to promotion may be with regard to criteria for consideration viz. determination of seniority or determination of merit. The conditions relating to promotion and the matters connected therewith are generally governed by terms of the contract of service or statutory provisions or Rules or executive instructions. If such contracts or statutory provisions or rules or executive instructions do not provide for an opportunity for promotion, the Courts can direct the authorities to give promotion if he is otherwise qualified.

The petitioner herein is seeking promotion to the rank of Colonel from the year 1996 and consequently to the rank of Brigadier along with his juniors from the month of December, 2001. It is not disputed before this Court by the learned counsel appearing for the parties that promotion from the rank of Colonel to Brigadier is by way of selection. It is the case of the petitioner that he joined in the Indian Army as Commissioned Army Medical Corps Officer in the year 1970 in

Lieutenant rank; that he was promoted as Captain and thereafter as major. According to him, he was eligible for consideration for promotion to the rank of Colonel in the year 1995 itself, but in the Medical Board Selection held on 01.05.1996, he was given grade 'D' against which he filed a statutory appeal to the second respondent, who passed order dated 31.08.1998 directing that the petitioner should be given a special promotion to the rank of Colonel. As seen from the proceedings dated 31.08.1998 of the second respondent, it was directed to promote the petitioner without effect on pay and allowances and on promotion the seniority of both Lieutenant Col. Surinder Mohan and Col. H.K.Sharma should be readjusted. Pursuant to the above orders of the second respondent, the petitioner was promoted as Colonel with effect from 25.05.1999.

The grievance of the petitioner is that though the eligibility for promotion arose in the year 1995 itself, he was not given promotion. Eligibility for promotion is one thing and filling up of actual vacancies by due selection process is another thing. Unless a person is selected for a particular post by duly constituted selection committee, mere eligibility can not be taken as criterion to give promotion from the date of eligibility. According to him, Col. H.K. Sharma is junior to him, but even the seniority list of the Medical Officers filed by the petitioner shows that H.K. Sharma was promoted to the rank of Colonel on 27.02.1997 whereas the petitioner was promoted to the rank of Colonel on 21.05.1999. The said seniority list has not been challenged. Therefore, for all practical purposes, his promotion to the rank of Colonel in the year 1999 is required to be taken into consideration for the promotion to the rank of Brigadier.

The petitioner was initially considered for promotion to the rank of Brigadier by the selection board meeting held on 14.12.2001. He was given 'D' grade because he did not earn requisite number of A.C.Rs in the rank of Colonel. At the time of consideration of his case, the

officer had earned only two A.C.Rs. Proceedings of the Government of India, Ministry of Defence dated 26.02.1996 would indicate the procedure to be followed for selection and promotion of Armed Medical Corps, including non-technical. These proceedings would indicate that a minimum of three A.C.Rs should be available for consideration of promotion to the rank of Brigadier. The petitioner was promoted as Colonel in the year 1999 and when the selection committee meeting for consideration of promotion to the rank of Brigadier was held on 14.12.2001, the petitioner had earned only two A.C.Rs. Therefore, his case was deferred from consideration giving grade 'D' for want of three A.C.Rs.. The guidelines issued by the Government of India show gradings of the promotion as follows:

"Grading 'A': fit for accelerated promotion to the next higher rank;

Grading 'B' : fit for promotion in his own turn;

Grading 'D' : defer consideration of the case till assessment by the Review Board;

Grade 'R' : Unfit for promotion at present."

Therefore, grade 'D' is due to some administrative or technical reasons like non-availability of latest A.C.Rs, finalisation of pending disciplinary proceedings, etc. Admittedly, no disciplinary case is pending against the petitioner and it is not a case of non-availability of latest A.C.Rs.. Since the petitioner was not having three A.C.Rs for consideration for promotion to the rank of Brigadier at the time of meeting of selection board held on 14.12.2001, he was given 'D' grade. Therefore, awarding such a grade can not be said to be contrary to the norms prescribed by the Government of India.

The direction given by the second respondent on 31.08.1998 to

promote the petitioner to the rank of Colonel has been complied with. He has not challenged that proceedings stating that he is entitled for promotion with effect from 01.05.1996. Further more, the selection process of the selection board is not challenged as arbitrary or illegal or that no fair procedure is adopted. For the reason that he did not earn three A.C.Rs., his case was rightly deferred. As the petitioner was not fit for promotion to the rank of Brigadier in the immediate vacancy in the year 2002, he was not given promotion. Since the selection process is not under challenge and no malafides are attributed against the selection committee, question of giving promotion to the petitioner to the rank of Brigadier along with his juniors from December, 2001 onwards, does not arise.

The Writ Petition is devoid of merits and the same is, accordingly, dismissed. No costs.

.09.2005

(K.C.Bhanu,J.)

DRK